

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Nov 16, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANDREA J. CLARE, individually,

Plaintiff,

v.

KEVIN P. CLARE, individually,

Defendant.

No. 4:18-CV-05045-SAB

**ORDER GRANTING MOTION
FOR PROTECTIVE ORDER;
DENYING MOTION FOR
LIMITED DISCOVERY**

Before the Court is Third Party Benjamin Dow's Motion for Protective Order Re: Plaintiffs' Deposition Subpoena, ECF No. 99, and the parties' Stipulated Motion for Extension of Time to Complete Limited Discovery, ECF No. 97. The motions were considered without oral argument. Plaintiff Andrea Clare is represented by George E. Telquist. Defendant Kevin Clare is proceeding pro se. Third Party Benjamin Dow is represented by Christopher Kerley.

Mr. Dow requests the Court issue a protective order preventing his deposition in this action. Mr. Dow represented Defendant Kevin Clare in his pending marriage dissolution proceeding, which is related to Ms. Clare's allegations in this case. Plaintiff Andrea Clare argues that his testimony is necessary to discern the extent of damages warranted, as Mr. Dow would provide testimony on how he knew certain information he presented in the dissolution

1 proceedings. In contrast, Mr. Dow contends that a deposition on this subject matter
2 would necessarily entail disclosure of information and strategy protected by the
3 attorney-client and work product privileges. The parties also request a limited
4 extension of the discovery deadline to depose Mr. Dow, subject to the Court's
5 decision on the Motion for Protective Order.

6 **Facts**

7 Plaintiff Andrea Clare and Defendant Kevin Clare were once a married
8 couple. During their marriage, Ms. Clare became a licensed attorney in
9 Washington. She left their marital home on February 6, 2016, and filed a petition
10 for dissolution in Walla Walla County on May 12, 2016. A subsequent petition was
11 filed in Franklin County on August 11, 2016. The dissolution proceeding is still
12 pending on appeal and awaiting a decision from the Washington State Court of
13 Appeals, Division III. ECF No. 108-3 at 14.

14 Ms. Clare alleges that after she left their martial home, Mr. Clare unlawfully
15 accessed her personal and professional email, text messages, and the contents of
16 her personal iPhone and iPad for nearly two years. Ms. Clare alleges that she
17 discovered and learned that Mr. Clare was utilizing her credentials to access her
18 private and confidential information on March 19, 2018. She asserts that Mr. Clare
19 used this information to learn about her whereabouts and plans, and also gave
20 information to his attorney for purposes of advancing his position in the dissolution
21 proceedings. In the present motion, she specifically alleges that Mr. Clare's
22 attorney, Mr. Dow, made statements of fact to the state court about Ms. Clare's
23 contingency cases, her whereabouts and actions, and whom she was spending time
24 with, which could have only been known through reviewing her private
25 correspondence.

26 Relevant here, Ms. Clare and her former law firm, Telquist McMillen Clare,
27 PLLC, initially filed this action on March 21, 2018. ECF No. 1. The first
28 Complaint named both Mr. Clare and Benjamin Dow as defendants. ECF Nos. 1,

1 18. Christopher Kerley and John Riseborough were retained to represent Mr. Dow
2 and to assist with his eventual dismissal. Mr. Riseborough jointly represented Mr.
3 Clare at that time. By the voluntary motion of then-Plaintiffs, Mr. Dow was
4 dismissed from the action with prejudice on November 8, 2018. ECF No. 47.

5 On February 18, 2021, Ms. Clare's counsel sent Mr. Dow a letter requesting
6 to take his deposition. Mr. Dow again retained Mr. Kerley to respond to the
7 request. Mr. Kerley and Mr. Telquist stipulated to a limited extension of discovery
8 after Mr. Kerley had an opportunity to file the present Motion for a Protective
9 Order.

10 **Procedural History**

11 Plaintiff Andrea Clare brings this lawsuit under the Stored Communications
12 Act, 18 U.S.C. § 2707. The action was filed on March 21, 2018, ECF No. 1, and
13 Defendants filed an Answer on April 20, 2018, ECF No. 9. The Court granted
14 Plaintiffs' Motion to Amend the Complaint on July 17, 2018, ECF No. 17, and
15 Plaintiffs filed their First Amended Complaint on July 25, 2018, ECF No. 19.
16 Defendants filed their Answer to the First Amended Complaint on July 25, 2018.
17 ECF No. 19. Defendants also filed a Motion to Dismiss for Failure to State a Claim
18 on July 25, 2018. ECF No. 20. Plaintiffs filed a Motion to Certify certain questions
19 to state court on August 6, 2018. ECF No. 22.

20 The Court granted the Motion to Dismiss on September 7, 2018 and denied
21 Plaintiffs' Motion to Certify, but granted leave to file an amended complaint. ECF
22 No. 34. Mr. Dow was voluntarily dismissed as a defendant on November 8, 2018.
23 ECF No. 47. In the Second Amended Complaint filed on October 10, 2018, Ms.
24 Clare was named as the sole Plaintiff. ECF No. 41. Defendant Kevin Clare filed an
25 Answer on October 29, 2018. ECF No. 46. The Court issued a Jury Trial
26 Scheduling Order on September 11, 2019. ECF No. 51.

27 Defendant filed a Motion for Summary Judgment on September 24, 2019.
28 ECF No. 52. The Court granted the motion on December 2, 2019, ECF No. 60, but

1 the Ninth Circuit reversed and remanded on December 8, 2020, ECF No. 68. The
2 Court held a status conference, ECF No. 74, and issued a new Amended Jury Trial
3 Scheduling Order, ECF No. 78.

4 The parties filed a Stipulated Motion for Protective Order, ECF No. 81,
5 which the Court denied on April 7, 2021, ECF No. 82. Plaintiff filed a Motion to
6 Compel and for Attorney Fees on April 8, 2021. ECF No. 83. Defendant also filed
7 a Motion for Confidentiality and Protective Order. ECF No. 87. The Court granted
8 the Motion to Compel and denied the Motion for Confidentiality on June 11, 2021.
9 ECF No. 96.

10 On September 7, 2021, the parties filed the pending Stipulated Motion for
11 Extension of Time to Complete Discovery (Limited). ECF No. 97. Third Party
12 Benjamin Dow filed the pending Motion for Protective Order Re: Plaintiffs'
13 Deposition Subpoena on September 16, 2021. ECF No. 99. On September 28,
14 2021, Plaintiff filed a Motion for Partial Summary Judgment on Liability; the
15 motion is noted for hearing on November 18, 2021. ECF No. 11.

16 Legal Standard

17 Federal Rules of Civil Procedure Rule 26(b)(1) defines the scope of
18 discovery. It provides that

19 [p]arties may obtain discovery regarding any matter, not privileged, that is
20 relevant to the claim or defense of any party, including the existence,
21 description, nature, custody, condition, and location of any books,
22 documents, or other tangible things and the identity and location of persons
23 having knowledge of any discoverable matter. . . . Relevant information
24 need not be admissible at the trial if the discovery appears reasonably
25 calculated to lead to the discovery of admissible evidence.

26 Fed. R. Civ. P. 26(b)(1). Protective orders may be issued under Rule 26(c),
27 provided that "good cause" is shown. Therefore, the burden is upon the movant to
28 show the necessity of its issuance, which contemplates "a particular and specific
demonstration of fact, as distinguished from stereotyped and conclusory
statements" *Id.*

Attorneys are not automatically exempt from being subjected to a subpoena to produce documents or to testify. *Shelton v. Am Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). Indeed, the Federal Rules of Civil Procedure contemplate that discovery of material known to an attorney is permissible in certain circumstances. Fed. R. Civ. Pro. 26(b)(3); Fed. R. Civ. P. 30 (e.g., a party may depose a “person by oral questions” and a person is not defined in the Rules to exclude counsel for a party). And generally, “attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by virtue of their license to practice law or their employment by a party to represent them in litigation.” *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 164 F.R.D. 245, 248 (D. Kan. 1995); *see also, e.g., Rainbow Investors Grp., Inc. v. Fuji Trucolor, Missouri, Inc.*, 168 F.R.D. 34, 36 (W.D. La. 1996) (“The deposition of an attorney may be both necessary and appropriate where the attorney may be a fact witness, such as an actor or viewer[.]”) (internal quotation marks and citations omitted).

Yet, courts generally disfavor subjecting opposing trial counsel to discovery, as it is potentially disruptive of the attorney-client relationship and the adversarial process. For example, as put succinctly from as district court in a separate circuit, “a client’s fear that counsel may be deposed could chill a client’s candor with counsel. Similarly, attorneys who fear they might eventually be deposed about their knowledge of documents or facts connected with a case ‘may lead attorneys to shield themselves from relevant facts, thereby resulting in less effective representation.’” *Am. Fed. Of State, Cty. & Mun. Employees (AFSCME) Council 79 v. Scott*, 277 F.R.D. 474, 479 (S.D. Fla. 2011); *see also Monster Energy Co. v. Vital Pharm., Inc.*, No. 5:18-CV-01882-JGB (SHKx), 2020 WL 2405295 (C.D. Cal. Mar. 10, 2020); *Littlefield v. Nutribullet*, No. CV 16-6894 MWF (SSx), 2017 WL 10438897, at *3 (C.D. Cal. Nov. 7, 2017); *In re Allergan, Inc. Sec. Litig.*, No. 14-cv-02004-DOC (KES), 2016 WL 5922717, at *4 (C.D. Cal. Sept. 14, 2016).

1 The Ninth Circuit has not adopted a standard governing when a deposition
 2 of counsel may go forward. In the absence of specific guidance from the Ninth
 3 Circuit, when a party seeks to depose opposing counsel in pending litigation, many
 4 district courts in the Ninth Circuit have adopted the test set forth by the Eighth
 5 Circuit in *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). *Chao v.*
 6 *Aurora Loan Servs., LLC*, No. C10–3118 SBA (LB), 2012 WL 5988617, at *3
 7 (N.D. Cal. Nov. 26, 2012) (“District courts in this district and elsewhere in the
 8 Ninth Circuit recognize *Shelton* as the leading case on attorney depositions.”);
 9 *DiLorenzo v. Costco Wholesale Corp.*, 243 F.R.D. 413, 415 (W.D. Wash. 2007)
 10 (“District courts in this [district] have uniformly followed the Eighth Circuit when
 11 analyzing whether to permit the deposition of counsel.”) (citing cases). In addition,
 12 several other circuits have either expressly adopted or cited the *Shelton* standard
 13 with approval. *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th
 14 Cir. 2002); *Nguyen v. Excel Corp.*, 197 F.3d 200, 208–09 (5th Cir. 1999);
 15 *Boughton v. Cotter Corp.*, 65 F.3d 823, 830–31 (10th Cir. 1995).

16 Under *Shelton*, a party seeking to depose an opposing party’s counsel must
 17 show that “(1) no other means exist to obtain the information than to depose
 18 opposing counsel; (2) the information sought is relevant and nonprivileged; and (3)
 19 the information is crucial to the preparation of the case.” *Shelton*, 805 F.2d at 1327
 20 (internal citation omitted). The *Shelton* court emphasized that while opposing trial
 21 counsel is not “absolutely immune from being deposed,” the “circumstances in
 22 which the court should order the taking of opposing counsel’s deposition . . .
 23 should be limited.” *Id.* The Eighth Circuit has since clarified that the exacting
 24 standard set by *Shelton* “was intended to protect against the ills of deposing
 25 opposing counsel in a pending case which could potentially lead to the disclosure
 26 of the attorney’s litigation strategy,” but “was not intended to provide heightened
 27 protection to attorneys who represented a client in a completed case . . . where the
 28 information known only by the attorneys regarding the prior concluded case [is]

1 factual basis in which he made certain representations to the state court,
2 specifically pertaining to statements which Ms. Clare believes were only known
3 through unlawful access of her email. Crucially, it is difficult for the Court to even
4 envision questions that could be asked of Mr. Dow at his deposition regarding this
5 issue that would not speak directly to protected attorney-client communications or
6 litigation strategy. There is a lateral issue that Mr. Dow's deposition would likely
7 implicate statements and information protected by the common-defense rule, as
8 Mr. Dow was a defendant in this lawsuit and shared counsel with Mr. Clare. In this
9 case, Ms. Clare has failed to demonstrate that there are no other means to obtain
10 the information than to depose Mr. Dow. As a result, the first *Shelton* factor weighs
11 against deposing Mr. Dow.

12 Notably, Ms. Clare does not deny that Mr. Dow's testimony on this issue
13 will implicate information protected by the attorney-client privilege and work
14 product privilege.¹ She also does not deny that the information to be elicited would
15 implicate this privilege *centrally*, as it directly concerns litigation strategy and
16 conversations with his former client, Mr. Clare, in the context of the marriage
17 dissolution proceedings. Ms. Clare attempts to avoid this issue by asserting that
18 Mr. Clare declared to the state court that Mr. Dow disclosed attorney-client
19 confidential information to third persons, which apparently led him to withdraw
20 from the case. ECF No. 104 at 7. She asserts that attorney-client privilege is
21 waived because of this fact. Ms. Clare does not, and neither do the remaining
22 parties, articulate the subject matter of any disclosed and/or privileged content. The
23 record is silent. Under Ms. Clare's theory, voluntary disclosure of one piece of
24 privileged information would eliminate the attorney-client relationship and usurp

25
26 ¹ Neither party expressly mentioned the common-interest rule, also known as the
27 joint defense privilege, but the Court finds this privilege is highly relevant to the
28 present dispute.

1 the privilege in its entirety. Absent additional information on the actual disclosure
2 made, if any, the Court cannot find that the attorney-client privilege was
3 voluntarily waived as to any subject matter. Due to this and the centrality of the
4 marriage dissolution proceedings to the deposition sought, the Court finds that the
5 deposition topic is predominately privileged. Consequently, the second *Shelton*
6 factor also weighs against permitting the deposition.

7 Ms. Clare has a right to perform discovery regarding the extent of her
8 damages, if any, proximately caused by Mr. Clare. However, the information
9 sought from Mr. Dow specifically is not necessary for preparation of Ms. Clare's
10 case. For the reasons articulated under the first *Shelton* factor, Ms. Clare has
11 remained able to acquire the same information as to the extent of her damages
12 from other sources without the risk of encountering privilege and work product
13 issues. Overall, Ms. Clare has failed to meet her burden that the information sought
14 is crucial to case preparation or resolution.

15 In contrast, Third Party Benjamin Dow has met his burden that a protective
16 order is warranted. The Court finds that good cause exists to issue a protective
17 order and accordingly quashes the deposition subpoena.² The Court further denies
18 Ms. Clare's incorporated motion for attorney's fees.

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22 ² While the Court declines to perform a detailed analysis under the *Friedman* test,
23 the Court finds that all relevant facts and circumstances indicate that any
24 deposition of Mr. Dow on the proposed subject matter should not proceed.
25 Specifically, the need to depose Mr. Dow, Mr. Dow's role and connection with the
26 present lawsuit and pending state court litigation, and risk of encountering
27 privilege and work product issues all weigh in favor of granting the protective
28 order.

Conclusion

The Court finds that it is inappropriate for Ms. Clare to depose Mr. Clare's former attorney, Mr. Dow, on the subject matter requested. Mr. Dow's deposition would centrally involve information protected by attorney-client and work product privileges. The Court is also concerned that Mr. Dow was likely exposed to privileged information related to the present lawsuit, as he was represented by the same attorney as Mr. Clare when Mr. Dow was named as a defendant in this action. There are other, less-burdensome avenues Ms. Clare could have pursued to acquire the same information related to damages and the extent of her alleged injury, and Ms. Clare has not demonstrated that the deposition testimony is crucial to preparation of her case. For these reasons, the Court grants the Motion for Protective Order and denies the related Stipulation.

The Court may consider a motion for limited discovery on the alternatives mentioned in this Order, or otherwise. In such case, the Court implores the parties to work cooperatively and reach a stipulation regarding discovery if possible. The Court may also consider a renewed, unilateral motion for additional discovery if Plaintiff can demonstrate that there are deposition inquiries and/or subject matters that do not implicate the privileges discussed above.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Third Party Benjamin Dow's Motion for Protective Order Re: Plaintiffs' Deposition Subpoena, ECF No. 99, is **GRANTED**.

2. The Notice of Taking Deposition and Deposition Subpoena of Benjamin Dow is **QUASHED**.

3. The parties' Stipulated Motion for Extension of Time to Complete Discovery, ECF No. 97, is **DENIED** with leave to renew.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies to counsel and pro se Defendant.

DATED this 16th day of November 2021.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
Chief United States District Judge